COURT'S ORDER WHETHER THE CASE IS OR NOT APPROVED FOR REPORTING

{Chapter VIII, Rule 32(2) (b)}

Description of the Case

Criminal Appeal No. 1144 of 2001
(Old No. 2331 of 1983)

Deb Ram S/o Bhola Ram
R/o Aga Patti, Patwari Area,
Digtauli, District Pithoragarh

.....Appellants

Vs.

The State

.....Opposite Party

Counsel for appellants: - Sri Rajesh Sharma, amicus curiae
Counsel for respondent: - Sri Amit Bhatt, Addl. G.A. for the State

~~A.F.R. (Approved for Reporting)~~
Not approved for reporting

Date : April 30, 2007

(Dharam Veer, J.)

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

CRIMINAL APPEAL No. 1144 of 2001
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.....Appellants

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Dated: April 30, 2007

Sri Rajesh Sharma, learned amicus curiae for the appellant
Sri Amit Bhatt, learned Addl. G.A. for the State

HON. DHARAM VEER, J.

This appeal, under Section 374(2) of the Code of criminal Procedure, 1973 (hereinafter referred as **Cr.P.C.**), has been preferred by the appellant against the judgment and order dated 24.09.1983 passed by Sessions Judge, Pithoragarh in Sessions Trial No.01 of 1983, State Versus Deb Ram, whereby the learned Sessions Judge convicted the appellant under section 376 I.P.C. and awarded for one year rigorous imprisonment.

2. The prosecution story in brief is that prosecutrix Km. Durga alias Draupadi, the prosecutrix was aged about 6 to 8 years is the resident of Village Aagar, Patti Digtoli, District Pithoragarh. The accused Dev Ram who was aged about 14 to 15 years is also the resident of the same village. A report of the present occurrence was lodged on 12.6.1982 at about 5:00 P.M. before the Kanungo, Pithoragarh by Sri Dhan Ram, resident of village Pabhen, Tehsil & District Pithoragarh. Paruli Devi is the grandmother of the child Durga and reporter Dhan Ram is the Samdhi of Paruli Debi. According to the first information report

Ex.Ka-2 lodged by Sri Dhan Ram, this child Durga is his daughter's daughter. It was mentioned in the FIR that on 10.6.1982 at about 8 to 9 A.M., the accused committed rape on the child Durga. The age of the victim was described as 6 years in the F.I.R. On hearing the cries of the child, Smt. Paruli Devi, the grand mother of the prosecutrix saw this occurrence. The father of Km. Durga was out in those days and on receiving this information from Smt. Paruli Debi, Dhan Ram brought the child for medical treatment at the Hospital, Pithoragarh on 12.6.1982 at 9:30 A.M. The written F.I.R. was got scribed on 12.6.1982 and the same was lodged on the same date at 5:00 P.M. on 12.6.1982. On the basis of this written F.I.R., a chick report Ex.Ka-3 was prepared by the Kanungo (in rural hill areas of the Uttarakhand, the Kanungo and Patwari are being vested with the police powers) and the case was registered against the accused under Section 376 I.P.C.

3. The child Km. Durga was produced for medical examination by Smt. Paruli Debi and Sri dhan Ram before Dr. Leela Pandey, Medical Officer, Har Govnd Pant Mahila Chikitsalaya, Pithoragarh on 12.6.1982 at 9:30 A.M. Doctor Smt. Leela Pandey examined the child on the same day at 9:30 A.M. and prepared a medical report Ex.Ka.1 dated 12.6.1982. The prosecutrix was having 10 Kg. weight and her height was 3½ ft. as reported by the lady doctor. It was specifically mentioned in the medical report that the labia majora was found swollen and very much painful on examination and labia minora was found developed inflammation. Further on the clitoris two pus discharging ulcers were found which were reddish in colour. The whole vulva was inflamed, hymen

present inflamed red and painful. Swollen posterior and lateral tears were present. Margins were inflamed, Vagina admits index finger ad anal region was also inflamed and swollen. Two contusion marks 2.5 cm. x 2 cm. and 3 cm x 5 cm were found on right groint and suprapubic region with bluish-black colour. The prosecutrix (child) was sent through Smt. Paruli Debi for x-ray examination in the B.D. Pandey Hospital, Pithoragarh. Vaginal smear was also taken for determination of spermatozoa.

4. The same lady doctor again submitted a report Ex. Ka. 1/1 dated 23.6.1982. Report showed no spermatozoa. On the basis of the X-ray report, in the opinion of the medical officer, the age the child was between 6 to 8 years. She also reported that the child has been used to sexual intercourse four days back.

5. The Kanungo, Investigating Officer inspected the place of occurrence in village Aagar, Patwari Kshetra Digtoli on 13.6.1982 and prepared a site plan Ex.Ka-4 and arrested the accused Deb Ram in Pithoragarh Bazar on 14.6.1982. The Kanungo had interrogated the witnesses and after completing the investigation, he submitted the charge sheet against the accused/appellant under Section 376 I.P.C. Ex.Ka-6

6. The Munsif Magistrate, Pithoragarh has committed the case to the court of sessions after complying with the provisions under section 207 Cr.P.C. The accused was charged under Section 376 I.P.C. by the Sessions judge, Pithoragarh on 4.4.1983. The charge was explained to him who pleaded not guilty and claimed to be tried.

7. The prosecution examined P.W. 1 Dr. Leela Pandey, Medical Officer, Har Govind Pant Mahila Chikitsalaya, Pithoragarh, who has examined the prosecutrix Km. Durga alias Draupadi on 12.6.1982 at 9:30 A.M. and prepared a report Ex.Ka-1 and Ex.Ka-1/1. The prosecution also examined P.W.2 Smt. Paruli Debi, grand mother of the prosecutrix, P.W. 3 Dhan Ram who is the reporter of the F.I.R., P.W. 4 Km. Durga who is the child witness and P.W. 5 Sri Harsh Singh Rautela, Investigating Officer/Kanungo.

8. Thereafter, the statement of the accused was recorded under Section 313 Cr.P.C., who denied the entire prosecution charges framed against him and stated that Dhan Ram, P.W. 3 did not pay the price of the buffalo which he had taken from his mother and therefore, Dhan ram on account of that dispute had falsely implicated him. However, the accused did not adduce any evidence in his defence.

9. After appreciating the evidence on record and hearing the learned counsel for the parties, the learned Sessions Judge has convicted the above-said accused under Section 376 I.P.C and sentenced him to rigorous imprisonment for one year vide his judgment and order dated 24.09.1983. Against the said judgment and order-dated 24.09.1983, the appellant has filed the present appeal before this Court.

10. I have heard Sri Rajesh Sharma, learned amicus curiae for the appellant and Sri Amit Bhatt, learned Additional Government Advocate for the State.

11. The prosecution in order to prove its case has examined P.W. 1 Dr. Leela Pandey, Medical Officer,

Har Govind Pant Mahila Chikitsalaya, Pithoragarh. She has examined the prosecutrix- Km. Durga alias Draupadi on 12.6.1982 at 9:30 A.M. and gave her medical report which reads as under:-

1. Small Scar measuring 1 cms length 2 mm. Breadth at left nipple.
2. Scar measuring 1x1 cms. 2" behind the left lobule of ear.

Definition 5-5
5-5

O/E.- Axillary and pubic haris are absent

- breast not developed, labia majora developed and separated from each other. Wt. 10 kg. Ht. – 3 ½ ft. and swollen very much painful on exam.
- Labia minora developed inflamed. On the Clitons pus discharging ulcers 2 reddish in colour.
- Whole vulva is inflamed.
- Hymen present inflamed red and painful and swollen posterior and lateral tears are present, margins are inflamed does not bleed on touch.
- Vagina admits index finger easily. There was no disch per vagina and there was no bleeding.
- Anal region is also inflamed and swollen. No any type of stains seen on undergarments.
- There are two contusion marks 2.5 cms x 2 cms and 3 cms. X .5 cms on rt. groint and suprapubic region, bluish black in color.
- Two vag/smear slides are taken and sent to Suptt. B.D. Pandey Hospital for determination of Spermatozoa.
- The girl sent to Suptt. B.D. Pandey Hospital for X-ray Elbow & wrist joint for determination of her age through Smt. Paruli Devi.

V/S Report: No Spermatozoa seen of 17.6.1982.
X-ray Report: Elbow-left Epicondyle & trochlea of humerous not appeared.
Medical epicondyle of humorous appeared. Head of radius not appeared. Olichronon not appeared.
Wrist- Distal end of ulna not appeared distal end of radius appeared. Carpel bone Capitate, Harmate, Triquitrum, Lunate, Trapezium, Trapezoid, seaphoid appeared Centre for head of meta carpals & 1st phalanges appeared.
Opinion:
(1) She has been used for sexual intercourse four days back.
(2) Her age is between 6 to 8 years (Minor).

12. The doctor also submitted a report on 23.6.1982 Ex. Ka. 1/1 after receiving the vaginal smear

report and x-ray report. On the basis of the report, she has stated that the age of prosecutrix (child) is about 6 to 8 years and she was subject to rape before four days.

13. P.W.2 Smt. Paruli Debi was examined by the prosecution in support of its case. She has stated that accused Deb Ram is known to her and e belongs to her village and the name of her grand daughter is Km. Durga and she was about 7 years old. She has also stated that occurrence was taken place about one year ago. Her daughter in law had gone to take the grass and she had gone to take the water. At that time Km. Durga was alone in the house. When she came back after taking the water then she heard the cries from the Goth of his house. She had opened the door and then she saw that accused Deb Ram was committing the rape (Kukarm) wit her grand daughter Durga. She also stated that accused Deb Ram had inserted his urine organ in the urine organ of her grand daughter and on her cries, Deb Ram had run away. Her grand daughter was in a bad position. The blood was oozing out from his urine place. Her frock was also stained with the blood. After this incident, she went to the house of her Samdhi in village Pamey and reached there at 7:00 P.M. and then she narrated the whole incident to his Samadhi. On the next day, she came to her own village along with her Samdhi and after that she and her Samdhi had taken the prosecutrix Km. Durga to the hospital. This witness was cross-examined by the defence counsel at length but nothing has come out from her statement which may discredit her evidence or create a doubt in her statement. I find the statement of this witness Paruli

Debi to be trustworthy, reliable, believable and natural.

14. P.W.3 Dhan Ram was prodeuced by the prosecution in support of its case. He has stated that on the tenth day of the Jeth-Asar month of the year 1982, his Samdhan Paruli Debi had reached his house at about 7:00 P.M. She has told him that the condition of his daughter's daughter is bad. She also told him that Deb Ram S/o Bhola Ram has committed the rape on her grand daughter in the Goth. He has stated that on 11th, he went to the village Aagar along with his Samdhan and he saw the position of his daughter's daughter. Her position was bad and she was not able to walk. Then he took her daughter's daughter to the to Pithoragarh on 11th and as he was late, he took his daughter's daughter for medical examination to the doctor on the next day i.e. on 12th and on the same day i.e. 12.6.1982, he lodged the report about the incident to Kanungo. The report was scribed by one Me. Pandey and whatever he has dictated, Mr. Pandey has written the same. He proved the report Ex.Ka.2. This witness was also cross-examined by the defence counsel at length but nothing has come out from his statement which may discredit his evidence or create a doubt in his statement. I find the statement of this witness to be trustworthy, reliable, believable and natural.

15. P.W.4 is the prosecutrix Km. Durga, child witness. She has given the statement in her own language which she used to speak in her house or in village. Her statement is as under:-

प्रष्न 1: तुम कहाँ रहती हो?

उत्तरः मैं आगरा रहती हूँ ।

प्रष्न 2: तुम्हारा बाबा कहाँ रहता है ?

उत्तरः मेरा बाबा आगर रहता है।

प्रष्न 3: इस समय रात है या दिन ?

उत्तरः दिन है।

प्रष्न 4: रात में क्या करती हो ?

उत्तर रात में पड़ रहती हूँ।

प्रष्न 5 :कब तुम पड़के उठती हो ?

उत्तरः रात्ते उठती हूँ।

प्रष्न 6: पेशाब आज कब की थी ?

उत्तरः रात्ते पेशाब की थी।

प्रष्न 7: बाहर कौन खड़ा है।

उत्तरः बाहर मेरी आया धाम में खड़ी है।

प्रष्न 8: तुम पेशाब कहाँ से करती हो।

उत्तरः बच्ची ने अपने हाथ से अपनी पेशाब की जगह हाथ रखकर बताया।

To Court

Note- In order to know whether the child witness understand the import of truth, I again to put question to her. The lady doctor has reported that 6 to 8 years of her age.

प्रष्न 9: सच और झूठ जानती है

उत्तरः साचि बोलने में पाप नि लागन और झूठि बोलबेर पाप लागद्द।

To Court-

Note- from the above replies given it appears that the child witness has got a rational understanding and also the import of truth and falsehood. To continue after the lunch hours.
As the witness does not understand the import of oath, as questioned to her and replied by her, I do not purpose to administer oath to her in view of the proviso of Section 4 (i) of the oaths Act, 1969; Although she understand the import of truth and false.

To Prosecution

1. मैं देबुआ को पहचनती हूँ जो यहाँ पीछे खड़ा है। देबुवा भी आगर में रहता है।
2. देबुवा मेरे गाठे में ऊपर चढ़ा । देबुवा ने अपनी ब्वारी मेरी पेशाब करने की जगह में खितछ। मेरे पीड़ हुई और पिसाब करनी ठोर से खून निकला।
3. यह इसने रात्ते में किया था। घाम आ गया था।
4. फिर वहाँ मेरी आया आई। मेरी रून सुन बरे आम ल कौ गोठ कोछ। आमा गाठे में आई तो देबुआ भाज गया।
5. उस समय मैंने झगुल पैर रक्खा था और झगुल में खून लागि रौछी।
6. उसके भोलि बार पिथौरागढ़ आये। फिर उसके भोलि बार पिथौरागढ़ में ड़ाकडरनी ने मेरी पेशाब की जगह देखी।
7. ब्वारी से पेशाब करते है।

XXXXXXXXXXXXXXXthe accused states that his counsel will put questions.

As the counsel is not present and hence deposition closed.

Noted:- The whole statement was read over by me to the witness & which she accepted.

XXXXXXXXXXXX On the requested of defence counsel Sri M.S. Adhiban:

8. मैं मुहँ से बोलती हूँ।
गवाह ने अपने मुह की तरफ हाथ रख कर बताया।
9. मेरे खल (आँगन) में झिक (ज्यादा) बच्चे खेलते है।
जिस समय देबुआ मुझ पर चढ़ा तो मेरी आया नीं थी। आया ने मुझसे कहा कि तुम ये बातें कहना।
10. देबुआ के साथ और कोई नहीं था।

Note:- A question was put whether there was any other person alongwith Dabuwa & to that question the witness gave the above reply.

11. धनराम मेरा बूबू (नाना) है। धनीराम देबुआ के घर से भैंस ले गया। गवाह ने हाथों को फैला कर कहा कि इतनी बड़ी भैस थी। मैं खेलने में नहीं लोरी (गिरी) मेरी माँ बाप ने मरी पेशाब की जगह चोप (एक तरह का जहरीला रस) नहीं डाला।

16. The aforesaid discussion clearly shows that the child witness Km. Durga was cross-examined by the defence counsel but nothing has come out from his statement which may discredit her evidence or create a doubt in her statement. I find the statement of this witness to be trustworthy, reliable, believable and natural.

17. P.W. 5 is Sri H.S. Rautela, Kanungo, Pithoragarh, the investigating officer of this case. He has stated that on 12.6.1982, he was posted as Kanungo in Pithoragarh. On the same day at 5:00 P.M., he had received a report Ex.Ka-2. On the basis of this report, he had prepared the Chick Report Ex.Ka-3 and thereafter a case under Section 376 I.P.C. was registered against the accused Deb Ram. He has further stated that on 13.6.1982, he went to village Agar and inspected the spot and prepared the site plan

i.e. Ex.Ka-4. On 14.6.1982, the accused Deb Ram was arrested by him and he was sent to Jail. He has recorded the statement of the witnesses and after completing the investigation, he has submitted the charge-sheet Ex.ka-6 in the court of Munsif Magistrate, Pithoragarh. This witness Harsh Singh Rautela was also cross examined by the defence counsel at length but nothing has come out from his statement which may discredit his evidence or create a doubt in his statement. I also find the statement of this witness to be trustworthy, reliable, believable and natural.

18. The prosecutrix child namely Km. Durga alias Draupadi aged about 6-7 years is said to have been raped by the accused who was aged about 14-15 years. The child Km. Durga used to live with her mother and grand mother namely Smt. Paruli Debi in Village Aagar, Patti Digtoli, Distt. Pithoragarh. The name of the father of the accused in Bhola Ram while the name of the father of the girl is Ganesh Ram. The Investigating Officer, Kanugo of the circle has shown the houses of Ganesh Ram and that of Deb Ram S/o Bhola Ram in the site plan Ex.Ka-4. Both these houses are very close to one another. The prosecution's case is proved by the statements of the child witness Km. Durga and her grand mother Smt. Parul Debi, who is the witness of the incident. As regards the age of the child i.e. 6 to 7 years, there is testimony of Smt. Paruli Debi P.W.2 and Sri Dhani Ram P.W.3. The lady doctor Smt. Leela Pandey has also stated that the age of Km. Durga with reference to her supplementary report Ex.Ka-1/1 is between 6 to 8 years and this Ex.Ka-1/1 was given on the basis of the X-ray report duly narrated therein. Km. Durga, the victim also appeared

as a witness and as such there is no reason to disbelieve the testimony of prosecution witnesses and the medical evidence on the point of her age. The occurrence was of June, 1982 and at that time she would have been about 6 to 8 years of age. In view of the above, it is well established that on the date of the occurrence, the prosecutrix was 6 to 8 years of age.

19. The age of the accused is also about 15 years. The learned Sessions Judge on 25.8.1983 has written his observation about the age of the accused. He observed that the age of the accused appears to be 15 years when the statement of the accused under Section 313 Cr.P.C. was recorded by the court. From the above observation of the learned Sessions Judge, it is clear that the accused Deb Ram is also about 14 years of age on the date of occurrence.

20. Learned counsel for the appellant argued that the F.I.R. is delayed. The delay in F.I.R. is explained by the prosecution witnesses. As per the statement of Smt. Paruli Debi P.W.2, after the occurrence on 10.06.1982, she had gone in the house of his Samdhi at village Pamey where she reached at 7:00 P.M. and on the next day she along with her Samdhi came to her own village Aagar and her Samdhi and she herself had taken Km. Durga to Pithorarh for medical treatment and had reached to the Pithoragarh in the evening hours. Then in the next morning on 12.6.1982, the girl was medically examined by P.W.1 Dr. Leela Pandey and after that on the same day, Dhan Ram P.W.3 have lodged the F.I.R. to the Kanungo on 12.6.1982. Thus, the delay in F.I.R. is well explained in the statement of P.W. 2 Smt. Paruli Debi and P.W.3 Dhan Ram. The father of the

prosecutrix Km. Durga was not in the house and he had gone somewhere with the work. Due to the above said reason, the delay in F.I.R. is not fatal for the prosecution case and delay has properly been explained. Under these facts and circumstances, the argument of learned counsel for the appellant is not tenable, as the delay has properly been explained.

21. Learned counsel for the appellant next argued that accused/appellant was not given the benefit of U.P. Children Act, 1951. The learned Additional Government Advocate submitted that the Government enforced certain sections of U.P. Children Act, 1951 to certain districts vide notification noted against each of the following table:-

Sl. No.	Sections enforced	Name of the Districts	Date and Notification numbers
1.	S. 34	Varanasi and Agra	w.e.f. 1.9.1956 Vide Notification No. 720/VI-1043(1) 55, dated 31.8.1956.
2.	All the provisions of this Act.	Allahabad, Agra, kanpur, Lucknow, Varanasi and Bareilly	w.e.f. 20.6.1962 Vide Notification No. 627(p) XXXVI-S-W-576(P) 61, dated 20.6.62
3.	Chapters I and II	Almora, Dehradun, Etah, Etawah, faizabad, Gorakhpur, Ghazipur, Jhansi, Mathura, Meerut, Mirzapur, Nainital, Saharanpur, Tehri, Garhwal, Unnao	w.e.f. 20.6.1962 Vide Notification No. 627(P) (iii) XXXVI-S-W-576(P)-61, dated 20.6.1962
4.	Section 2 to 76 and 78 to 88	Moradabad	w.e.f. 11.11.1967 Notification No. 4995-XXXVI-S-W-32(P) 67, dated 30.10.1967.
5.	-Do-	Hardoi and Shahjhanpur	w.e.f. 11.12. 1971 Vide Notification No. 5246-XXXVI-S-W-32(P)-67, dated 23.11.1971.

22. A perusal of the aforesaid table makes it clear that U.P. Children Act, 1951 was not enforced in District Pithoragarh. Hence, the provisions of U.P. Children Act are not applicable in District Pithoragarh.

23. From the above-discussed statement of P.W.2 Smt. Paruli Debi, P.W. 3 Dhan Ram and P.W.4 Km. Durga, the prosecutrix (child witness), it is

established beyond doubt that Km. Durga was raped by the accused Deb Ram on 10.6.1982 at 8-9 A.M. in a Goth in Village Aagar, Patti Digtoli, Distt. Pithoragarh and the offence punishable under Section 376 I.P.C. is proved against the accused/appellant. The learned Sessions Judge after appreciating the evidence has rightly convicted the above said accused under section 376 I.P.C. and awarded for one year rigorous imprisonment.

24. In view of the above, the appeal is devoid of merit and is hereby dismissed. The judgment and order dated 24.4.1983 as well as sentence awarded by leaned Sessions Judge, Pithoragarh for one year R.I. is hereby confirmed. The sentence already served out by the appellant shall be adjusted after verifying from the records.

25. Let the record of the case be sent to the trial court for compliance.

(Dharam Veer, J.)

Rajeev Dang